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IN THE

Supreme Court of the United States

OCTOBER TERM—1946

No. 455

FRED J. MARTIN, Trustee (Objectant),

Petitioner,

against

EUGENE CAMPANARO, EDWARD GRIMM, JAMES MURPHY, JOHN WELLMAN, JACK CELLELLA, EDWARD THORN, DAVE BARTLEY, ANTHONY RAGOZZINO, JOHN MENCHEN, SAM NUSSO, JAMES URSO, LEON DOERR, FRANK BRUNO, EMIL ISOLA, JAMES RECLA, IRVING DRIESACKER, JOSEPH BRIENZA, THOMAS TOBIN, GEORGE FARINA, BERNARD COFFEY, GEORGE NADAR, DANIEL WEIR, SALVADORE CARELLI, BURNETT FULLER, JOHN ADAMI, ANGELO CASSANO, VINCENT CAMMARATA, CARMINE GIORDANO, PETER CACABRESE, WALTER REEVES, FRANCIS LOTZ, OTTO WOLPERT, LOUIS CAMPANARO, WALTER CVARNESKI, GEORGE MOGLEY and PETER WILCHA (Claimants),

Respondents.

IN THE MATTER

of

SUBURBAN BUS CO., INC.,

Bankrupt.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PAGE

Statement of Matter Involved 1

POINT I—The Circuit Court properly found respondents' claims to be provable under Section 63a(4) of the Bankruptcy Act 5

A. There was no express contract between the parties after May 23, 1944 as to the wages to be paid. 6

B. There was no implied contract between the parties to work for the old wage scale after May 23, 1944 6

POINT II—The Circuit Court of Appeals properly exercised its appellate power of review 13

POINT III—The decision of the Circuit Court is consistent with the public policy of harmonious collective bargaining 16

Conclusion 18

TABLE OF CASES

Baltimore & Ohio R. Co. v. United States, 261 U. S. 592, 597 6

Carpenter v. United States, 17 Wall. (U. S., 1873) 489, 495 6

Chinnery v. Kennossett Realty Co., 286 N. Y. 167, 173.. 7

City of New York v. Davis, 7 F. (2) 566, 572, 573, 574... 5

Consolidated Products Co. v. Blue Valley Creamery Co., 97 F. (2d) 23, 28, cert. den. 305 U. S. 629..... 6

PAGE

In re Winton Shirt Corp., 104 F. (2d) 777 (C. C. A. 3).. 15

J. I. Case Co. v. N. L. R. B., 231 U. S. 332..... 12

Medo Photo Supply Corp. v. N. L. R. B., 321 U. S. 678. 12
Meislahn v. Irving National Bank, 62 App. Div. 231, aff'd 172 N. Y. 631..... 12
Miller v. Schloss, 218 N. Y. 400, 406, 407..... 6, 7
Mosel v. Frank Brewing Co., 2 App. Div. 93..... 13
Mutual Life Ins. Co. v. Hillmon, 145 U. S. 285..... 16

New York Telephone Company v. Jamestown Telephone Corporation, 282 N. Y. 365, 371, 372, 374-375.....7, 11

Order of Railroad Telegraphers v. Railway Express Agency, 312 U. S. 342..... 12

Robertson v. Berger, 102 F. (2d) 530, 531 (C. C. A. 2).. 15
Ryan v. Ward, 48 N. Y. 204..... 13

STATUTES

Bankruptcy Act:
Section 63a(4) 2
Section 24(a) 14

11 U. S. C. A.:
Section 24(a) 14

TEXTS AND ARTICLES

Corbin, Anson on Contracts, pages 508, 509..... 5

Restatement, Contracts § 3 11
Restatement, Contracts § 5..... 6
Restatement, Contracts § 5, Comment (a).....5, 11

3 Moore's Federal Practice (1938) § 42.01, p. 3049..... 16

1 Williston, Contracts § 3.....6, 11

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Statement of Matter Involved

Respondents herein are thirty-six (36) claimants who filed thirty-six (36) identical unliquidated claims against the bankrupt estate, as employees of the bankrupt corpora-

tion, under Section 63a(4) of the Bankruptcy Act. The thirty-six (36) claims are all for back-pay of an unliquidated amount owed for services rendered from May 24, 1944 to May 3, 1945 by the claimants-respondents, as employees of the bankrupt, Suburban Bus Company, Inc., hereinafter called "Suburban". The claimants-respondents were operators, mechanics, and helpers on Suburban's bus lines in Yonkers and New York City. During that entire period from May 24, 1944 to May 3, 1945, and for seven successive years before that, their chosen and exclusive bargaining representative for the purpose of negotiating their wages and working conditions was Local Division 1134, of Amalgamated Association of Street, etc., Coach Operators of America, A. F. of L., herein called "Amalgamated" (fols. 225, 254).

On April 19, 1944, in accordance with the parties' customary practice and the provisions of their agreement then in force, Amalgamated notified Suburban of Amalgamated's desire to terminate the contract which would expire on May 23, 1944 and that it wished to confer with Suburban for modifications and revisions of the collective agreement for the ensuing year, May 24, 1944 to May 23, 1945 (fols. 177-185, 225, 255). By letter dated April 21, 1944 Suburban agreed to enter into such conferences on April 27, 1944 (fol. 255).

After many months, the parties could not come to a mutual agreement on a revised scale of wages, hours and overtime pay for the covered employees. In September, 1944, new interests purchased control of Suburban, but continued to operate in its name (fol. 226). Negotiations then reached a complete stalemate and on December 7, 1944, the New York State Mediation Board referred the dispute to the National War Labor Board (fol. 226). Thereafter, on December 18, 1944, the Secretary of the United States Department of Labor officially certified the dispute to the National War Labor Board (fol. 227).

A formal hearing was held on the dispute on January 16, 1945. The recommendations of the Board's hearing officer, dated February 13, 1945, were issued by the Board on February 16, 1945 (fol. 227). The primary recommendations were for an increase of 10 cents an hour in the scale of rates for all operators, and a reduction in the straight-time work day to 8½ hours, with overtime at time and one-half for all hours worked beyond 8½ hours each day. Further, it was recommended that the adjustments be retroactive to May 24, 1944, the date of the expiration of the former contract between Suburban and Amalgamated (fol. 227).

The Regional War Labor Board on April 30, 1945, issued its "Directive Order" sustaining the recommended increases in the former wage scale and directing a regular 9-hour day, 48-hour work week with time and a half for overtime, all retroactive to May 24, 1944 (Claimants' Exh. 3, fols. 205-215). The directive expressly decreed that the above "terms and conditions of employment shall govern the relations between the parties" (*idem.*). Suburban never petitioned the National War Labor Board for review of this order or any portion of it. Thus, by the terms of the order and the procedural rules of the War Labor Board the interim order became final.

During the entire period of the foregoing negotiations and hearings concerning the claimants' demand for increased pay and improved working conditions, all to be retroactively effective, Suburban continued to pay the claimants at the rates designated by the old contract. The then president of Suburban had offered to increase the hourly pay of certain of the operators, but that offer was rejected by the employees and Amalgamated continued to press for more sufficient increments (fols. 150-154, 158-161, 185-191).

Suburban was put into bankruptcy on March 22, 1945; on May 2, 1945, the assets of Suburban were sold, by order

of the Referee; and on May 3, 1945 all of the claimants-respondents herein were discharged. For the services rendered by them from May 24, 1944 to May 3, 1945, respondents never received any monies in excess of that paid under the wage scale which expired on May 23, 1944, nor have they received any part of the back-pay awarded by the Regional War Labor Board. Claims were duly filed on or about May 19, 1945 for the unliquidated amounts owing to the claimants-respondents (fols. 7-12, 312-313). These claims were for the reasonable value of the services rendered and were, therefore, not premised exclusively upon the Regional War Labor Board Award (see Proof of Claim, fols. 7-11; see also fols. 47-48, 199-200).

The petitioner's single motion objecting to the foregoing claims was granted by the Referee in a decision dated October 11, 1945 and the claims were expunged (fols. 223-273). The decision and order of the Referee were sustained in an order of the District Court for the Southern District of New York entered on January 21, 1946 (fols. 292-303), but unanimously reversed by order of the Circuit Court of Appeals for the Second Circuit entered on June 5, 1946. The said Circuit Court of Appeals remanded the case for further proceedings in accordance with the opinion written by Circuit Judge FRANK, wherein the claims were found to be provable to the extent that the reasonable value of the services performed by respondents for Suburban for the period from May 24, 1944 to May 3, 1945, the date of the discharge of all of the claimants-respondents, exceeded the sums paid to them by Suburban during that time.

It is to review this order of the said Circuit Court that the petitioner prays for a writ of certiorari. It is submitted that the decision of the said Circuit Court is completely in conformance with the applicable authorities, and the contentions of the petitioner are so insubstantial and devoid of merit that the writ should be denied by this Court.

I

The Circuit Court properly found respondents' claims to be provable under Section 63a(4) of the Bankruptcy Act.

Respondents have at all times relied upon the elementary principle that employees are entitled to the reasonable value of their services where there is no contract establishing the wage rates to be paid for such services. Indeed, petitioner has at no time, and has not upon this petition, denied that the following is the governing rule of law in such situations:

> "The action is based on *quasi* contract, and it is no defense to such an action to allege that the parties did not contract. The nature of the action in itself admits that the parties did not enter into a contract. But the fact remains that a public corporation, like a private individual, may be liable on a *quantum meruit* if, having the power to make a contract, but having made none, it has nevertheless enjoyed the benefit of work performed or materials furnished to it * * *." *City of New York* v. *Davis*, 7 F. (2) 566, 572-573 (Rogers, C. J.) (see cases cited at pp. 573-574; see also Restatement, *Contracts* § 5, Comment (a); Corbin, *Anson on Contracts*, pages 508-509).

It is, therefore, significant that petitioner does not claim that the monies paid respondents by Suburban after May 24, 1944 constituted the reasonable value of the services performed. Instead, petitioner has insisted that simply by continuing to work for Suburban after May 24, 1944, respondents entered into a new contract to continue working at the old wage scale and are, therefore, not entitled to recover the reasonable value of their services. This conclusion was expressly repudiated by the Circuit Court, and is contradicted by the record in the case as well as by the governing authorities.

A

There was no express contract between the parties after May 23, 1944 as to the wages to be paid.

The Referee has pointed out that the contract between Suburban and Amalgamated ran from May 23, 1943 and "expired on May 24, 1944" (fols. 245, 260). As early as April 19, 1944 Amalgamated, in accordance with that union contract, gave Suburban written notice of its desire "for termination, changes or modifications" of the contract (fol. 177). Thereafter, no new written contract was entered into. No proof was submitted, and no finding was made to indicate that the wages paid to the claimants were in accordance with any wage scale expressly agreed upon after May 23, 1944 (fols. 66-77, 177, 244, 255-256, 260). Indeed, the undisputed facts as to all the negotiations and hearings concerning a new wage scale for the period after May 23, 1944 are conclusive proof that no such wage scale was expressly agreed upon. Moreover, neither Amalgamated nor the individual employees ever signed any releases or waivers (fols. 194-198).

B

There was no implied contract between the parties to work for the old wage scale after May 23, 1944.

Contracts implied in fact, unlike those implied in law, require the same type of mutual assent required of all other true contracts. (*Carpenter* v. *United States,* 17 Wall. (U. S., 1873) 489, 495; *Baltimore & Ohio R. Co.* v. *United States,* 261 U. S. 592, 597; *Consolidated Products Co.* v. *Blue Valley Creamery Co.,* 97 F. (2d) 23, 28, cert. den. 305 U. S. 629; *Miller* v. *Schloss,* 218 N. Y. 400; 1 Williston, *Contracts,* § 3; Restatement, *Contracts,* § 5.) Where the facts, or the intentions of the parties, are inconsistent with the existence of

an alleged implied contract, then no implied contract can be found (*Miller* v. *Schloss*, 218 N. Y. 400, 406-7; *Chinnery* v. *Kennossett Realty Co.*, 286 N. Y. 167, 173). Consequently no new implied contract to continue under an expired or terminated contractual arrangement can be inferred from the mere continuance of an economic relationship after the expiration of that contract unless the parties clearly intended to make such a new contract.

An examination of the leading New York case of *New York Telephone Company* v. *Jamestown Telephone Corporation*, 282 N. Y. 365, which establishes the New York law as to the implied renewal of an expired or terminated contract, will demonstrate conclusively that there was here no implied contract to continue to work at the old wage scale. In that case the plaintiff and the defendant had entered into a contract wherein the plaintiff agreed to connect its telephone system with that of the defendant, the sole telephone company in the city of Jamestown. The telephone systems were thus linked to facilitate long distance calls into and out of Jamestown. Consequently, a schedule of tolls for such traffic was filed with the Public Service Commission and payments for the services rendered in connection with the joint traffic were fixed by the contract between the parties. Payments were made pursuant to this contract until March 1, 1932, when defendant stopped making payments to the plaintiff. Prior to that date the defendant had given to the plaintiff a notice of termination in the manner provided by the contract for its termination; and subsequent to that date the joint traffic had been continued. The defendant had not otherwise taken any steps which might be deemed inconsistent with its termination of the contract. Upon this state of facts, the plaintiff sued to recover amounts due from the defendant, for services rendered by the plaintiff after March 1, 1932, pursuant to the terms of the old agreement. The defendant admitted liability, but contended that the contract came to an end on March 1, 1932 and that thereafter

it was liable only for the reasonable value of services received by the defendant.

From the foregoing it is evident that the New York Court of Appeals was there required to fix the precise rule of law now applicable to the issue raised upon this petition. Indeed, the then Chief Justice of that Court, the late Judge LEHMAN, posed the issue as follows:

> "The issue between the parties is whether the amount to be paid must be measured in accordance with the terms of the express contract or in accordance with an implied contract to pay the reasonable value of such benefits" (282 N. Y. p. 371).

And it is, therefore, here decisive that the New York Court of Appeals unanimously affirmed a judgment in favor of the defendant on the grounds that the measure of recovery for the services rendered after the termination of the old contract is their reasonable value. The basis for that holding makes it evident that there is not the slightest suggestion of any conflict between the applicable New York law and the conclusion of the Circuit Court of Appeals herein:

> "Where, after the expiration of a contract fixing the reciprocal rights and obligations of the parties, they continue to do business together, the conduct of the parties may at times permit, or even constrain, a finding that the parties impliedly agree that their rights and obligations in connection with such business should continue to be measured as provided in the old contract. Even in such case, however, the reciprocal obligations arise from the new implied contract and, unless an intent to make such a new contract is expressed or may be fairly inferred from the conduct of the parties, the obligations of the parties are as matter of law not measured by the terms of the contract which has expired. (*Harlem Gaslight Co.* v. *Mayor*, 33, N. Y. 309.) No distinction, in principle, can be drawn here between a contract which, according to its terms, expires on a date

fixed by the parties at the time the contract is made and a contract which expires at a date fixed thereafter by notice given in accordance with the terms of the contract. (*Peoples Trust Co.* v. *Schultz Novelty & Sporting Goods Co.*, 244 N. Y. 14.) Here notice was so given and according to its terms the contract expired on March 1, 1932, unless that notice was withdrawn or rendered ineffective by subsequent acts or words of the parties. The problem presented upon this appeal is whether the notice was in fact withdrawn or rendered ineffective by the subsequent acts of the defendant.

The defendant having given notice that the contract would end on March 1, 1932, did nothing in the interval which evinced any intention to withdraw the notice or which was in any way inconsistent with such notification. Nothing occurred thereafter which dictates or, indeed, permits an inference that the defendant intended to withdraw its notice. On the contrary, it affirmatively appears . . . that the defendant did not intend to withdraw its notice and always contended that the contract was at an end; and the plaintiff recognized that the contract was terminated . . . The rights and obligations of the parties after March 1, 1932, cannot be measured by the terms of the contract which had come to an end on March 1st. Though after the expiration of an express contract, an implied contract containing the same terms may arise from the conduct of the parties, that is not the case here. Instead of implied acceptance of the old obligations, there was here express repudiation of such obligations" (282 N. Y., pp. 371-372).

Here, Amalgamated, the exclusive bargaining agent for the respondents and all the other employees of Suburban not only gave the notice required under the contract for its termination at its expiration date (fols. 177-185, 225, 255), but at all times after May 23, 1944 sought a new contract with a higher wage scale, shorter working hours, improved working conditions, etc., for the period beginning May 24, 1944. These were the requests to which Suburban had re-

fused to accede after protracted negotiations, resulting in the certification of the dispute to the National War Labor Board. Thus, not only had Amalgamated sent notice of termination of the contract to Suburban as a manifestation that Amalgamated did not consider the wage provisions of the contract effective after May 23, 1944, but at all times thereafter Amalgamated took every proper and legal measure at its disposal, short of striking (fol. 247), to obtain a new contract which would reflect its conception of a satisfactory wage policy. And at no time did Amalgamated act as if, or intend to be, bound by the contract which expired on May 23, 1944. On the contrary, Amalgamated, as the exclusive bargaining representative of the respondents, was all along seeking a new wage scale to be retroactive to the date of the expiration of the old contract.

Of course, during the period in question, the employees had to be paid and so the bankrupt continued to pay the respondents on the basis of the former agreed scale of wages and hours, the very scale which was then the subject matter of the dispute. But such action is a far cry from the conclusion that Amalgamated acted as if, or intended that, the wage provisions of the old contract continue and that, therefore, an implied contract arose between Amalgamated and Suburban. It may well be that each week, upon claimants' receipt of monies, Amalgamated might have sent a letter to Suburban stating that the acceptance of such payments was "without prejudice to their rights as might later be determined" in the manner suggested by the Referee (fols. 245-246). But the Referee himself found that Suburban was a party to the negotiations and hearings wherein Amalgamated was vigorously asserting claims to wage increases, to be retroactive to May 24, 1944, on behalf of its members (fols. 227-228). This put Suburban on notice just as surely as would the procedure suggested by the Referee.

Further, the fact noted by the Referee (fol. 247) that Amalgamated did not call the men out on strike, but, in-

stead, sanctioned their continuance on the job, affords no inference that the old contract was renewed; particularly since, from May 23, 1944 to May 3, 1945, Amalgamated was observing the no-strike pledge given by labor during wartime. Indeed, even this aspect of the case at bar is governed by *New York Telephone Company* v. *Jamestown Telephone Corporation*, 282 N. Y. 365. For there too it was apparently contended that the continuance of the rendition and the receipt of services prescribed by the old contract after the notice of termination was inconsistent with that notice of termination and instead implied a renewal of the old contract. This contention was rejected by the Court of Appeals (see 282 N. Y., pp. 374-375) and at 282 N. Y., page 375 it was pointed out:

> "Continuance of a joint service to the public, which neither party could lawfully discontinue without permission of the Public Service Commission, is not in law or in fact inconsistent with notice of termination of a contract, fixing, as between the parties, rights and obligations in the performance of the joint service."

Thus, the undisputed facts here show: (1) Amalgamated and the respondents were seeking wage increases retroactive to May 24, 1944; (2) Suburban was fully aware of Amalgamated's efforts because Suburban was a party to the negotiations and hearings on the proposed wage increases, and, indeed, Suburban actually proposed a certain wage increase (fols. 150-154); and, therefore, (3) no implied contract to work for the old wage scale here existed since Amalgamated never intended that, or acted as if, the old wage scale was still in effect. At no point in the record is there the "mutual agreement and intent to promise" (1 Williston, *Contracts*, § 3) or "manifestation of mutual assent" (Restatement, *Contracts*, § 3; see also § 5, Comment a), required by elementary contract law in order to give rise to an implied contract to receive the old wage scale.

These conclusions are in nowise affected by the individual claimants' receipt of the weekly pay upon which they depended for their sustenance. The record amply demonstrates that the acceptance of that pay by the respondents was no express or implied relinquishment by them of the right to the reasonable value of their services, for at the very time of the receipt of their pay the respondents knew of and supported their duly constituted representative in its negotiations for a pay increase which would be retroactive (fols. 191-195). Nor is it contended that the respondents at any time signed any releases or waivers to the favor of the bankrupt (fols. 194-198).

In view of the undisputed fact that Amalgamated was the exclusive bargaining representative of the employees and Amalgamated was at all times actively asserting the right of those employees to retroactive pay increases before the War Labor Board, the exclusive forum, it was, therefore, unnecessary—indeed, improper—for any member of Amalgamated to take independent steps to reserve his rights. (*J. I. Case Co.* v. *N. L. R. B.*, 321 U. S. 332; *Medo Photo Supply Corp.* v. *N. L. R. B.*, 321 U. S. 678; *Order of Railroad Telegraphers* v. *Railway Express Agency*, 312 U. S. 342.) Accordingly, the course of conduct of the parties created no contract between Suburban and the individual employees.

Moreover, even if the respondents did sign a receipt in full when being paid, that fact would not be controlling so long as there were negotiations for a new scale of wages. A similar conclusion was reached in a New York case where no union representative was involved. In *Meislahn* v. *Irving National Bank*, 62 App. Div. 231, affd. 172 N. Y. 631, plaintiff was suing in *quantum meruit* for the reasonable value of services performed by him as a check clerk for defendant from May 31, 1899 to June 30, 1899. During that period he received a regular salary, and "signed a receipt in full" (62 App. Div. 234), although he had been negotiating throughout for a wage increase commensurate

with the new duties he performed after May 31, 1899. The Appellate Division for the First Department sustained the judgment entered in favor of the plaintiff, and expressly found that the receipt and acceptance by plaintiff of salary on the basis of his old scale was not conclusive of plaintiff's rights to recover in *quantum meruit*. No case relied upon by petitioner (see Petitioner's Brief, pp. 17-18) contradicts the foregoing principle that an expired or terminated contract will not preclude a recovery in *quantum meruit* for services rendered after its expiration or termination where the entire pattern of the conduct of the parties is inconsistent with the continuance of the old contract. And the single circumstance of the receipt of monies will not, according to the New York law, prevail over such an entire pattern to effect either a release or a renewal of an expired or terminated contract.

Ryan v. *Ward*, 48 N. Y. 204;
Mosel v. *Frank Brewing Co.*, 2 App. Div. 93.

Thus, the applicable New York authorities make it plain that there was no contract to work for the old wage scale after May 24, 1944, and that respondents are not otherwise barred from receiving the reasonable value of the services rendered by them for Suburban after that date.

II

The Circuit Court of Appeals properly exercised its appellate power of review.

Petitioner argues that the respondents' failure to move formally for leave to appeal to the Circuit Court from the decision of the District Court is a reason for granting the writ sought by petitioner (Petitioner's Brief, pp. 20-21). This argument is premised upon the section of the Bankruptcy Act which provides that when any order, decree, or

judgment involves less than $500.00 an appeal therefrom to the Circuit Court may be taken only upon allowance by the appellate court (Bankruptcy Act, § 24a; 11 U. S. C. A. § 24(a)).

The fallacy of petitioner's position is that nowhere in the record does it appear that respondents' claims, either singly or in the aggregate, are less than $500.00. The claims are unliquidated claims, and petitioner's efforts to calculate in advance the amount of those claims are both futile and misleading. For even if respondents' claims be considered singly, still no records have been submitted to indicate the number of hours worked by each of the respondents. Moreover, petitioner's reckoning employs only the hours and wage rates recommended by the Regional War Labor Board which was predicated upon a stabilization program and may be considerably less than the reasonable value of respondents' services for which the claims herein have been filed.

The indeterminate feature of respondents' claims bring them outside the scope of Section 24a. That section is not interpreted merely to mean that an appeal as of right lies in those cases involving more than $500.00, but, rather, to mean that allowance must be obtained only where less than $500.00 is involved. Consequently, only when it is clear that less than $500.00 is involved need a claimant apply for leave to appeal to the Circuit Court of Appeals.

> "* * * § 24a of the Chandler Act, 11 U. S. C. A. § 47(a) * * * gives us a broader jurisdiction than we had under §§ 24a and 24b, as they stood before 1938 * * * for it authorizes appeals on the law and the facts, not only in 'controversies,' but in 'proceedings in bankruptcy.' Two provisos are annexed to it, the first need not concern us, but on the second this motion turns. It reads that 'when any order * * * involves less than $500,' the appeal requires our 'allowance,' so preserving a vestige of the discretionary jurisdiction conferred by the amendment

> of 1926. We think that it means, not that our jurisdiction is discretionary whenever the order 'involves' anything except money of more than $500 in amount, but only when it 'involves' money alone, and less than $500. Our reasons are drawn both from the letter and the apparent purpose. Literally, an order like that at bar does not 'involve less than $500': since it involves no money at all, it cannot involve less than any sum, for the comparative necessarily implies the characteristic. So much for the words. As to the purpose, the exception, which seems to have been drawn from § 25(a) (3), 11 U. S. C. A. § 48, was apparently designed to exclude trifling disputes." (*Robertson* v. *Berger,* 102 F. (2d) 530, 531 (C. C. A. 2); see also, *In re Winton Shirt Corp.,* 104 F. (2) 777 (C. C. A. 3).)

Thus, the indeterminate amount of respondents' claims, which patently constitute more than a "trifling dispute," make it plain that the Circuit Court properly reviewed the order of the District Court herein upon respondents' notice of appeal (fols. 304-309).

Any doubt as to the propriety of the action of the Circuit Court should be dispelled by Circuit Judge FRANK'S observation:

> "• • • obviously the claims aggregate more than $500; the Referee passed upon the claims as a group; the claimants, in effect, consolidated their claims in their petition for review, without objection from the Trustee; and the judge treated them as if consolidated. Such consolidation was proper, under F. R. C. P. 42 (a) which applies here under General Order 37" (Record on Appeal, p. 112).

It is to be observed that what was before the Referee was the petitioner's single motion addressed to all the claims and that there was before the District Court and the Circuit Court the resulting single order expunging all the claims (fols. 19-30; 268-273). Thus, by petitioner's own computa-

tions, as observed by the Circuit Court of Appeals, far more than $500.00 was involved in the single order from which this appeal was taken.

Of course, the foregoing result is neither affected by the fact that respondents did not move for consolidation (*Mutual Life Ins. Co.* v. *Hillmon,* 145 U. S. 285; 3 *Moore's Federal Practice* (1938), § 42.01, p. 3049); nor is it affected by those cases wherein it was held that claims may not be aggregated to total over $3,000 for the purpose of creating jurisdiction (see Petitioner's Brief, p. 21), since Section 24a does not deny the Circuit Court jurisdiction to review cases involving less than $500.00 but merely makes the review of such cases discretionary with the Circuit Court.

In any event it is anomalous for the petitioner to assert that the Circuit Court's action was improper, because it did not formally allow leave to appeal, since that Court ultimately reversed the decisions of the Referee and the District Court in order to sustain the claims of the respondents herein. This action by the Circuit Court makes it indisputable that the alleged failure of the respondents to obtain leave to appeal presents no basis for the granting of the writ sought by the petitioner.

III

The decision of the Circuit Court is consistent with the public policy of harmonious collective bargaining.

Upon this petition for a writ of certiorari, the petitioner has made the novel assertion that the right of an employee to obtain the reasonable value of his services will

> "* * * create regrettable confusion and litigation in labor-management relations. Employers will hesitate (on the basis of the Circuit Court decision) to confer or negotiate with unions with the possibility of future lawsuits by the employees being

> brought against the employers to recover on *quantum meruit* if the negotiations stretching over some period of time do not result in any agreement being reached between the union and employer" (Petitioner's Brief, p. 22).

It is indeed difficult to appreciate how an employee's right to the reasonable value of his services can be considered as

> "* * * a condition that would disrupt peaceful or harmonious relations between labor and management" (Petitioner's Brief, p. 10).

A more enlightened approach to modern labor relations would make it apparent to the petitioner that collective bargaining is facilitated where the parties thereto are aware that orderly, legal processes rather than economic warfare are available when employees are denied the reasonable value of their services.

But petitioner's contentions in this regard must be viewed in the context of the particular record presented upon this petition. For there is considerable irony in petitioner's solicitude for harmonious collective bargaining. The record indicates that the petitioner discharged each and every one of respondents under circumstances which amount to an unfair labor practice. Indeed, that discharge, stalemating and terminating the contract negotiations which would have contained some retroactive provision for the period subsequent to May 23, 1944, was the genesis of this litigation and it is, therefore, improper for petitioner to conjecture that:

> "* * * employees could go into the conference room with their 'tongues in their cheeks'—wait to see what happens—if the negotiations bring about a result to their liking, then they would be satisfied—if not, then they could sue their employer for *quantum meruit*" (Petitioner's Brief, p. 10).

The mockery of petitioner's profession of solicitude for avoiding "strikes and lockouts" (Petitioner's Brief, p. 8)

is pointed up by the fact that his petition here invites employees to strike and, indeed, would relegate them only to that right to enforce their demands. Thus, petitioner asserts that respondents waived their right to the reasonable value of their services because, instead of striking, they continued to work for Suburban under labor's wartime no-strike pledge, after May 23, 1944:

> "Despite the so-called wartime no-strike pledge given by organized labor (*i. e.*: the national unions) referred to in the Circuit Court's opinion (R. 114), it does not appear from the record that Amalgamated or the Claimants gave any such pledge to Suburban. There was nothing to prevent claimants from refusing to work unless Suburban promised them a higher wage" (Petitioner's Brief, p. 9).

This contention of the petitioner makes it unnecessary to elaborate any further that the public policy of harmonious collective bargaining would not be served by granting petitioner the writ sought.

CONCLUSION

The petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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